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No. 77-1708

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY R. BULLINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court abused its discretion by failing to grant a mistrial following admission of evidence of petitioner's prior similar misconduct.

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of transporting a stolen motor vehicle in interstate commerce, in violation of 18 U.S.C. 2312 (Count I), and of concealing a stolen motor vehicle, in violation of 18 U.S.C. 2313 (Count II). He was sentenced to consecutive terms of three years' imprisonment on Count I and one year's imprisonment on Count II and was fined $5,000 on each count. The court of appeals affirmed by judgment order (Pet. App. A).

1. The evidence at trial showed that in December 1975 a new 1976 Lincoln Continental with a retail value of more than $14,000 was stolen from a Lincoln Mercury dealership in Gainesville, Florida (Tr. 22-26). Approximately two weeks later, petitioner purchased the car in Leesburg, Florida, for $4,000 from Robert Caruthers, who informed petitioner that there was no certificate of title to the car (Tr. 39-41, 45). Petitioner drove the car to Tennessee in early January 1976, stored it in an old building behind his place of business, and replaced the stolen Florida license plate on the car with a Tennessee dealer's tag that belonged to a truck (Tr. 112-114, 312). The car was recovered on March 23, 1976, soon after it had been driven from petitioner's residence by one of his employees (Tr. 111, 138-143).

2. During the government's rebuttal case, Caruthers testified that in late January 1976 petitioner returned to Florida with one of his employees to receive some stolen trucks that he had arranged to purchase from Caruthers, but that the transaction was never completed because Caruthers was arrested for tax evasion and car theft (Tr. 36, 331, 333, 354-356). Petitioner contends (Pet. 6-12) that he was unfairly prejudiced by the admission of this testimony because the aborted stolen truck incident occurred after the offense charged, the introduction of the evidence was not shown to be necessary, and the existence of the other criminal acts was not supported by clear and convincing evidence. Therefore, petitioner maintains, the district court erred in refusing to grant a mistrial.

It is indisputable that evidence of similar acts, even if those acts are themselves criminal, is admissible to prove a defendant's intent or the absence of mistake. See, *e.g.*, Fed. R. Evid. 404(b); *Andresen* v. *Maryland*, 427 U.S. 463, 483, 484. Here, where petitioner's defense was lack of knowledge that the car was stolen, Caruthers' first-hand testimony that petitioner had arranged with him to purchase some stolen trucks, just three weeks after his purchase of the stolen car and during the time that the car was being concealed, was extremely probative of petitioner's knowledge and intent and further suggested a general plan. See *United States* v. *Grady*, 544 F. 2d 598, 604-605 (C.A. 2).[1] Since a defendant's knowledge of the stolen nature of the motor vehicle is an element of the offense under Sections 2312 and 2313, evidence of petitioner's contemporaneous involvement in similar criminal activity with the same person plainly was relevant to establish that element. See *United States* v. *Gocke*, 507 F. 2d 820, 824 (C.A. 8), certiorari denied, 420 U.S. 979. The jury properly could have inferred that petitioner was involved in a continuing scheme to purchase stolen vehicles, which would have tended to establish that he had knowingly and intentionally committed the charged offenses.

As petitioner notes (Pet. 10-11), the district court initially indicated that, while Caruthers' rebuttal testimony was relevant to the issues at trial, it was concerned about the inflammatory nature of the testimony and was therefore disposed to declare a mistrial. After further reflection, however, the court concluded that the probative value of the evidence outweighed the possible prejudice to petitioner (Tr. 348-350). A trial judge's determination of matters such as this should be given deference. Cf. *Arizona* v. *Washington*, No. 76-1168, decided February 21, 1978, slip op. 17.

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[1] Fed. R. Evid. 404(b) does not restrict proof to bad acts that occurred prior to the criminal offense for which the defendant is being tried.

Moreover, any unfair prejudice to petitioner from the challenged statements was substantially reduced by the jury instruction that the court immediately delivered (Tr. 350-351):

> BY THE COURT: Now, ladies and gentlemen of the jury, before you were excused the witness gave an answer to a question which has to do with a subsequent contact, an alleged subsequent contact according to this witness, and it's up to you to determine the truthfulness or nontruthfulness of the witness' statement of an alleged contact between the defendant and this witness.
>
> The Court is permitting you to hear this evidence solely for the purpose of your consideration of it to determine—and you give it such credibility as you think it deserves—to determine as it might bear upon the absence [of] mistake or accident or on the intent of the defendant in this type of situation.
>
> You are not—this is not—the defendant is not charged with any conduct that is—that the witness is going to testify about. You may not consider it upon the guilt of innocence of the defendant except insofar as it bears on intent or as it might bear on accident, mistake or accident. He's not charged with any subsequent activities, and you may not consider them for that purpose.

In sum, in light of the obvious probative value of Caruthers' testimony and the district court's limiting instructions, the court did not abuse its discretion in refusing to grant a mistrial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.

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